(19)

IN THE

Supreme Court of the United States

———Term, 1944

No. 290

C. B. KENNEMER, ET AL, *Petitioners and Appellants Below,*

vs.

C. B. BILLINGTON, ET AL, *Respondents and Appellees Below.*

REPLY OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

AUTHORITIES

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I.

STATEMENT OF THE CASE

The Statement of the case, which is contained in the Petition for Certiorari, and in the supporting brief of the Appellees herein, is believed to be somewhat inadequate, particularly in regard to the issues which were presented to and decided by the Circuit Court of Appeals. The opinion of said court, which was rendered on March 28, 1944, is reported in Federal Reporter, second series, Volume

141, Page 555. A reading of said opinion discloses the factual background of this litigation and the controverted issues of fact and questions of law were decided. As appears from the record in this cause and the opinion of the Circuit Court of Appeals, the only propositions which were submitted to such court, and the court's ruling thereon, are succinctly stated as follows:

(1) The trial court's Findings of Fact that (a) the mineral deed under attack was not signed in blank but was properly completed before its execution by the grantors, and (b) that it was properly and privily acknowledged, were supported by the evidence, and Appellants' contention that such Findings should be set aside as clearly erroneous under Rule 52(a) of the Rules of Civil Procedure, was overruled.

(2) Said mineral deed was subsequently expressly ratified by the Grantors by written instrument executed by them in 1942.

(3) If it be conceded that such mineral deed was neither duly executed nor acknowledged, nor effectively ratified by the grantor Mrs. Kennemer, same being in all events valid as to her husband, the grantor C. B. Kennemer, such deed became fully operative upon the death of Mrs. Kennemer, which occurred prior to the institution of this suit, to the extent of the one-half undivided mineral interest which was purported to be conveyed thereby.

II.

ARGUMENT

POINT A: Inasmuch as neither the District Court nor the Circuit Court of Appeals considered or decided, as a matter of law, the question whether or not a mineral deed conveying an interest in lands in Texas constituting the homestead of the grantors, if executed in blank and without acknowledgment, is valid; and inasmuch as such question is the only ground upon which Petitioners herein seek to invoke the jurisdiction of the Supreme Court, the Petition for Certiorari should be refused.

In the Petition for Certiorari, herein, Page 13, the sole question presented is stated as follows:

> "Whether a mineral deed upon land constituting the homestead of husband and wife is a valid conveyance when executed in blank, with no grantee, no description of the property sought to be conveyed and not acknowledged before a notary public, as provided by the Constitution and laws of the State of Texas."

In conformity with the foregoing there appears on Pages 16 and 17 of Petitioners' supporting brief, the following statement:

> "(c) The jurisdiction of this Court is invoked upon the following grounds:
>
> "(1) In holding that a deed upon a homestead may be executed in blank by a husband and wife, and that the name of the grantee in said deed and the de-

scription of the property sought to be conveyed may be later added, and that a notary public may attach his certificate thereto without either of the parties having personally appeared before such notary, the United State Circuit Court of Appeals decided an important question in conflict with Section 52, Article 16 of the Constitution of the State of Texas, and in conflict with Articles 1288, 1300, 3995 and 6605 of Vernon's Annotated Texas Statutes, and in conflict with the well settled line of decisions of the Supreme Court of the State of Texas and particularly in conflict with ROBERTSON, ET AL, vs. VERNON, ET UX, 12 S. W. (2d) 991, and in conflict with the decisions of this Honorable Court and particularly in conflict with DRURY vs. FOSTER, 2 Wall. 24, 34, 17 L. Ed. 780, as will be hereinafter more fully set out."

A rather casual reading of the record in this case will reveal that the Petitioners herein are seeking to gain a review of this cause upon a premise which is entirely false and which is wholly without foundation. Nowhere in the record in this cause can be found a statement or holding by either the District Court or the Circuit Court of Appeals to the effect that as a matter of law a deed conveying mineral interest in homsestead lands, when executed in blank, or without proper acknowledgment, is valid. Neither of the courts below undertook to determine such question. Indeed it was wholly unnecessary that such question be determined for the simple reason that the trial court expressly found (1) that the mineral deed in question was not executed in blank, and (2) that the same was properly

acknoweldged. Hereinbelow we quote the Findings of the trial court on such issues, as follows:

> "4. On October 28, 1929, the said C. B. Kennemer and wife, Lottie Kennemer, made, executed, and delivered unto C. D. Davis a deed of conveyance wherein and whereby said grantors sold and conveyed unto said grantee an undivided one-half interest in and to all the oil, gas, and other minerals, in and under and that may be produced from the above described lands and premises, subject to any valid lease of prior date, but covering and including one-half of the rentals and royalties payable under the terms of said lease, and containing covenants of general warranty. Said deed was prepared upon a printed form, but prior to the execution and acknowledgment thereof by the grantors the various blanks contained in said printed form were duly filled in, including the names of the grantors and grantee, a complete description of the property affected, the interest therein conveyed thereby, and a recited consideration.
>
> "5. The grantors C. B. Kennemer and wife, Lottie Kennemer, appeared before W. C. Stevenson, a duly qualified and acting Notary Public in and for Wood County, Texas, for the purpose of acknowledging the aforesaid conveyance. Thereupon said Notary Public duly took the acknowledgments of each of said grantors to said conveyance in the manner provided by the Statutes of Texas for husband and wife, and duly so certified to same, as reflected by the certificate of acknowledgment affixed to said deed." (Findings of Fact Nos. 4 and 5, R. Page 241)

A further examination of the record in this cause will disclose that substantially the sole burden of Petitioners'

complaint to the Circuit Court of Appeals rested upon the contention that the foregoing Findings of Fact of the trial court were wtihout support in the evidence and were so clearly erroneous as to authorize the appellate court to set the same aside under the provisions of Rule 52(a) of the Rules of Civil Procedure. With the exception of two assignments which attack the ruling of the trial court on admissibility of testimony, all of the specifications of error which were assigned in the appeal to the Circuit Court of Appeals, were directed to the alleged insufficiency of the evidence to support the trial court's Findings. An examination of the specifications of error cited in Petitioners' brief herein, which are substantially the same as those specifications which were cited in their brief before the Circuit Court of Appeals, will give support to the foregoing statement. (Petitioners' Brief, Pages 27 to 35)

The Circuit Court of Appeals accorded due consideration to the contentions of the Appellants (Petitioners herein) attacking the sufficiency of the evidence to support the trial court's Findings of Fact and expressly overruled the same in the following language:

> "We agree with appellees that the clear and positive findings of the district judge that the deed was properly completed before execution and that it was properly and privily acknowledged may not be set aside by us as erroneous. The facts and circumstances in support of the validity of the deed and the completeness and legality of its execution, if they do not com-

pletely overweigh those in support of its invalidity, certainly fully support the findings of the district judge that they do, and the judgment must be affirmed on these findings * * * *." (R. Page 255)

Consequently, it appears beyond question that the decisions of both the trial court and the Court of Civil Appeals in the instant cause were controlled and determined by specific Findings of Fact to the effect that the mineral deed in question was properly prepared and completed when executed and, likewise, was thereafter properly acknowledged. Such fact findings necessarily dispensed with any determination by either court of the legal question which is here posed by the Petitioners.

Therefore, in the light of the record in this cause Petitioners are placed in the untenable position of undertaking to invoke the jurisdiction of the Supreme Court for the determination of a question that was neither presented to nor decided by either of the lower courts. It now appears to be definitely settled that the Supreme Court will not consider on certiorari an issue which was not dealt with by the Circuit Court of Appeals. *Owens v. Union Pacific RR Company, 63 S. Ct. 1721, 87 L. Ed. 1683; Burnet v. Commonwealth Improvement Company, 53 S. Ct. 198, 287, U. S. 415, 77 L. Ed. 399.* Likewise, it is the established rule that the Supreme Court will refuse to consider a question which was not assigned as error in the Circuit Court of Appeals. *Sonzinsky v. United States, 57 S. Ct. 554, 300 U. S. 506, 81 L. Ed. 772; Waterloo Distill-*

ing Corporation v. United States, 51 S. Ct. 282, 282 U. S. 577, 75 L. Ed. 558.

Inasmuch, therefore, as the sole question which is submitted in the Petition herein as a basis for review by the Supreme Court was neither cited as error in the appeal before the Circuit Court of Appeals, nor decided by such Court, it necessarily follows that the Supreme Court will not be disposed to undertake to review the action of the courts below in this proceeding. It has distinctly been decided that the only question the Supreme Court will accord consideration on petition for certiorari is the question which is stated in the petition. *Helvering v. Taylor, 55 Supreme Court, 287, 293 U. S. 507, 79 L. Ed. 623; Rorick v. Devon Syndicate, 57 S. Ct. 877, 307 U. S. 299, 83 L. Ed. 1303.*

POINT B: Inasmuch as both the District Court and the Court of Appeals made concurrent Findings of Fact that the mineral deed in question was not executed in blank and that same was duly acknowledged by the grantors, the Petition for Certiorari herein, being grounded in an attack upon such Findings of Fact, should not be entertained by the Supreme Court.

As has been stated hereinbefore, the District Court expressly found to be a fact (1) that the mineral deed in controversy which was executed by C. B. Kennemer and wife, was not executed in blank, as alleged by the Petitioners, but that the same was duly completed when it

was signed by the grantors; and (2) that said grantors duly appeared before a Notary Public and properly acknowledged such instrument. After due consideration of the evidence the Circuit Court of Appeals expressly held that the aforesaid Findings of the trial court found support in the evidence, contrary to the contention of the Appellants that such Findings were clearly erroneous under Rule 52(a) of the Rules of Civil Procedure. Thus Petitioners herein find themselves confronted with the inescapable conclusion that the fact issues upon which any relief they seek must be founded have been decided by both of the courts below adversely to their contention. In view of this situation it is respectfully submitted that the Supreme Court will not grant the Petition for Certiorari herein. It appears to be the established rule that the Supreme Court will accept concurrent Findings of the District Court and the Circuit Court of Appeals on all questions of fact when such Findings are not shown to be clearly erroneous or unsupported by the evidence. *T. N. O. RR. Co. v. B. of R. & S. Clerks, 50 S. Ct. 427, 281 U. S. 548, 74 L. Ed. 1034; Virginian Ry. Co. v. System Federation No. 40, 57 S. Ct. 592, 300 U. S. 515, 81 L. Ed. 789; United States v. O'Donnell, 58 S. Ct. 708, 303 U. S. 501, 82 L. Ed. 980; The Linseed King, 52 S. Ct. 450, 285 U. S. 502, 76 L. Ed. 903.*

Without deeming it necessary to review at length the evidence in this cause, we shall undertake to make only brief references to certain portions of same which will

convincingly disclose that the factual contentions of the Petitioners were strongly controverted, and that both the trial court and the Circuit Court of Appeals were amply warranted in determining such issues of fact adversely to Petitioners. Briefly stated, Petitioners base their case upon the testimony of the Petitioner Kennemer and witnesses Davis and Craddock, both of whom were shown to be inimical to Respondents, to the effect that the mineral deed in question was executed by Kennemer and his wife at a time when a description of the property and the name of the grantee had not been inserted, and further, that neither of said parties appeared before the Notary Public whose name was signed to the certificate of acknowledgment appended to the deed. Each of said witnesses testified that the name of the grantee and the description of the land in question were inserted in the deed after same was signed, and that the certificate of acknowledgment of the Notary Public was attached to the instrument at the request of the witnesses Davis and Craddock and without the grantors having appeared before the Notary for the purpose of making such acknowledgment.

It is significant, however, that each of said witnesses admitted frankly that the mineral deed when completed reflected the exact transaction to which Kennemer and wife had agreed, and that they were paid and accepted the stipulated consideration therefor. The testimony of the

witness Davis in this respect is reflected in the following:

"Q. The facts recited in this instrument truly reflect the trade you made with Mr. Kennemer?

A. It was being purchased by Mr. Gilbreath, but the instructions were that it be left in blank. I didn't discuss with Kennemer whether I was buying it for Gilbreath, Craddock or Davis, just bought it and gave him a check for it.

Q. In all other respects the instrument reflects the true trade you made with Kennemer, does it not?

A. Yes.

Q. And you paid the money you agreed to pay him and he accepted it and cashed it?

A. That's right." (R. Page 59-60)

To like effect is the testimony of the witness Craddock:

"Q. Didn't you tell them this: 'So far as I know, C. B. Kennemer sold this royalty in a fair and square way, and I know of nothing to the contrary?'

A. Yes, sir.

Q. You say it now, don't you?

A. Yes, sir.

Q. You never did tell Mr. Gilbreath or Mr. Billington that there were any irregularities in this mineral deed you procured for them, did you?

A. No, I didn't know there was anything."

Petitioner Kennemer himself frankly concedes that the conveyance which he executed correctly reflected the true transaction. Observe the following:

> "Q. Is there anything about this mineral deed that you are now attacking that don't reflect the exact trade you made with Mr. Davis at that time?
>
> A. I don't know that there is." (R. Pages 129-130)

In this connection the following colloquy took place between the trial court and the Petitioner Kennemer:

> "THE COURT:
>
> "I understand the law about this business, but just answer me this: How can you from a moral standpoint justify this claim after you sold this mineral interest, and it conforms to the terms you agreed to sell it on, and you got your money?How do you justify bringing this law suit?
>
> A. I don't know whether there is any justification or not; it's just a matter of fact.
>
> THE COURT:
>
> I don't think so either." (R. Page 143)

Respondents were handicapped by the fact that neither of them was present at the transaction surrounding the execution and acknowledgment of the mineral deed in question, and by the fact that in the meantime the Notary Public whose certificate was affixed to the mineral deed in question, as well as Mrs. Lottie Kennemer, wife of the Petitioner, C. B. Kenemer, had died, and their ver-

sions of the facts, therefore, was unavaliable. Nevertheless, the testimony of Petitioner Kennemer and his witnesses, Davis and Craddock was conclusively discredited. Senator W. D. Suiter testified to the effect that he had discussed the matter with both Davis and Craddock subsequent to the event, and that both of them had stated to him that the transaction was regular in every particular. A portion of his testimony is as follows:

"Q. What did Mr. Craddock say with reference to his participation in the preparation of that mineral deed and the description in it?

A. My recollection is he stated he prepared all those instruments, and that he did not have any recollection of having prepared this instrument, but he supposed he did, because of having prepared all of them, and he stated that he understood—this is not the exact language—

Q. In substance.

A. In substance, that he was not present when Mr. and Mrs. Kennemer came down there, and didn't know anything particularly about the execution of that instrument.

Q. Did he state anything with reference to the insertion of the field notes? Did he say anything with reference to that in that conversation?

A. He said he didn't remember when the field notes were put in, that he didn't have any distinct recollection of that at all." (R. Pages 168-169)

Q. Did you also have a conversation with Davis about this mineral deed, about the Kennemer mineral deed that is in controversy here, in Winnsboro?

A. On that afternoon or maybe the next day I was in the office with C. D. Davis and Mr. Craddock, and we discussed the matter and Mr. Davis stated, in substance, that he did not understand why Kennemer had brought this suit, that this was absolutely a fair and square deal, and Mr. Kennemer got the money for his royalty, and the deed was made to him, and he assigned it to Mr. Billington, and so far as he knew there was no irregularity about it in any way. In substance that's what he said." (R. Pages 168-169)

The testimony of Mrs. Alice Niblack with reference to a statement made by the witness Davis in her presence concerning the transaction in question, further refutes his testimony. Mrs. Niblack testified that Mr. Davis made a statement which she reduced to writing prior to the trial of this case in which Davis said the following:

A. 'It is now my recollection that I was not in Winnsboro at the time Mr. Kennemer and his wife came in to sign and acknowledge the mineral deed, but that I was out in the country closing up some other trades. I have no recollection of ever discussing this matter with Mrs. Kennemer at all'." (R. Pages 185-186)

The testimony of the Petitioner Kennemer is further impeached by the testimony of the Respondent Gilbreath who detailed a conversation between said parties a few days after the transaction involved. We quote from such testimony as follows:

"Q. Did Mr. Kennemer make any statement as to where it was his wife was to be signed up?

A. He said it was prepared for her to sign at Como.

Q. Did he make any further statement to you as to how the transaction was concluded?

A. He said he had his wife go with him to Winnsboro, and they went into C. D. Davis' office to sign the instrument and make the acknowledgment; that neither Mr. Craddock nor Mr. Davis was there, and that there was a Mr. Stevenson in there, and he and his wife went before Mr. Stevenson and signed the instruments, and Mr. Stevenson acknowldged the instruments in Winnsboro, and he received the check from Mr. Stevenson.

Q. Did he say who gave him the check?

A. Yes.

Q. Who?

A. Mr. Stevenson, I think.

Q. Did he say anything about the field notes?

A. He said it was completed, the oil and gas lease was completed, and that the mineral deed was completed; that he had taken the field notes down and they were put into the deed." (R. Page 196-197)

It is respectfully submitted that the foregoing excerpts from the testimony in this cause adequately sustains the action of both the trial court and the Circuit Court of Appeals in holding that under the evidence in this cause Petitioners' claim is unfounded in fact. To say the least,

it must be addmitted that the evidence is amply sufficient to uphold the Findings of the courts below and to negative the contention that such Findings are clearly erroneous under the evidence.

In view of this situation Petitioners are in position of having "begged he question" in undertakng to seek a review of this cause by the Supreme Court on the ground set forth in the Petition herein. Palpably the "question presented" presupposes the finding that the mineral deed in question was executed in blank and that same was not properly acknowledged. Such, however, being contrary to the Findings of Fact by both courts below, there remains no basis whatever for the submission of such question. Conceding, for the sake of argument, that the case of *Drury v. Foster, 2 Wall. 24, 17 L. Ed. 780,* by the Supreme Court of the United States, and the case of *Robertson v. Vernon, 12 S. W. (2d) 991,* by the Supreme Court of Texas, sustain the legal proposition contained in Petitioners' "question presented," no necessity here exists to chanllenge such holdings for the reason that same are not applicable to the facts in this case, as determined by the District Court and the Circuit Court of Appeals.

CONCLUSION

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari in this cause should be denied for the following reasons:

(1) The question presented in the Petition as the sole basis for review of this cause by this Honorable Supreme Court is one that was neither presented to nor decided by the Circuit Court of Appeals;

(2) The only question presented in the Petition is predicated upon an assumed state of facts which is contrary to the fact findings of both the District Court and the Circuit Court of Appeals, which Findings are amply supported by the evidence.

WHEREFORE, Respondents say that this cause is not a proper one for review by Certiorari in this Court, and they pray that the Petition for Writ of Certiorari herein be in all things denied.

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